No. 6867

# In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
APPELLANT,

vs.

The JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION,
a corporation,
APPELLEE.

PETITION FOR REHEARING,
CERTIFICATE OF COUNSEL,
SUPPORTING BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

HON. CHARLES C. CAVANAH, District Judge

BISSELL & BIRD, of Gooding, Idaho,
for Appellee.



Filed February ....., 1933

.....Clerk

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## PETITION OF APPELLEE FOR REHEARING

To the United States Circuit Court of Appeals, for the Ninth Circuit, and the Judges thereof—

The petition of appellee, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, respectfully shows:

1. That the above entitled cause was argued and submitted to this court on the 15th day of December, 1932, and on January 23, 1933, this court made and entered its decree and opinion reversing the judgment of the district court, with instructions that judgment be entered upon the pleadings and findings in favor of the United States, and dismissing the action for lack of jurisdiction.

2. Your petitioner, the above named appellee, respectfully submits that the decree and opinion of this court, so made and entered on January 23, 1933, is erroneous in the following particulars and upon the following grounds, to-wit:

(a) In concluding that the bondholders (appellee) had no interest in, or lien upon, the property within said improvement districts at the time the government acquired title to the property for a reservoir site, which land is now under the waters of such reservoir, due consideration was not given to the construction heretofore placed upon the Idaho improvement district statutes by the highest tribunal of the state of Idaho, which construction is contrary to that adopted by this court.

(b) If it be conceded for the sake of the argument that such bonds were not in law or equity a lien upon the lands within the respective districts at the time the government acquired such property, nevertheless error was committed in reversing the trial court and dismissing the action, for the reason that the bonds themselves, independent of any lien or liens upon the land, constitute "property" within the meaning of the Fifth Amendment, and by "taking" such bonds-property for a public purpose without making compensation to the owner (appellee) an implied contract has been created to pay therefor. By completely taking away the full use and value of said bonds forever the government has effectively "taken" the bonds themselves, in a constitutional sense.

(c) The conclusion that the immediate action was instituted "too late" and not within six years of the time when "the government acquired the property for a reservoir site" does not appear to be supported by the record, and it is therefore erroneous. The record shows the

date of acquisition of only two lots, and the many others may or may not have been acquired within six years of the date of filing the suit on November 25, 1929. The burden of submitting this proof rested upon, but was not borne by, appellant. Also, because the government acquired the lots subject to existing liens and encumbrances, thus clearly and explicitly evincing its intention not to "take" appellee's property. This intention was further manifested by the government officials in charge holding $13,000 or $14,000 for the purpose of paying appellee's bonds "until sometime in 1929 before they paid it to the landowners" (R. 134).

WHEREFORE, Your petitioner respectfully prays that this court grant a rehearing of said cause on such terms as to this court shall seem just, and that upon such rehearing the judgment of the trial court be affirmed.

Dated February 14, 1933.

BISSELL & BIRD,
Attorneys for Appellee.

## CERTIFICATE OF COUNSEL

STATE OF IDAHO
County of Gooding } ss.

Branch Bird, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the appellee in the above and foregoing cause; that he has read and considered the foregoing petition for rehearing, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; and that this petition is presented in good faith, and the same is not interposed for delay.

Branch Bird.

Subscribed and sworn to before me this 14th day of February, 1933.

P. T. Sutphen,
Notary Public, residing at
Gooding, Idaho.

(Seal)

No. 6867

# In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

The JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION,
a corporation,
Appellee.

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## SUPPORTING BRIEF

### IDAHO COURT'S INTERPRETATION

It is respectfully and earnestly urged that in concluding that the bondholders (appellee) had no interest in, or lien upon, the property within the improvement district at the time the government acquired title to the property now buried beneath the waters of American Falls Reservoir, this court failed to give proper weight and consideration to the laws and decisions of the state of Idaho appertaining to the situation.

The position of appellee is that the bonds and the unpaid amounts thereon are liens upon the lands in the district, not until some particular assessment is paid, but until the whole "cost and expense" of the improvement work is fully paid for. The assessment is merely one step in the program. The assessment itself does not

constitute the lien, but the entire proceedings, including the ordinance of intention, the ordinance creating the district, the levy of assessment, and the issuance of the bonds,—all are part and parcel of the program contemplated by the statutes. All these various steps are essential and culminate in the improvement, the obligation, and the lien against the property as represented by the bonds.

All these statutes enter into and form a part of the contract as fully and completely as though copied bodily into the bonds. (Fidelity State Bk. v North Fork H. Dist., 35 Idaho 797, 809, 209 Pac. 448, 31 A.L.R. 781.)

It is confidently urged that the Idaho case of Bosworth v Anderson, 47 Idaho 697, 280 Pac. 227, 65 A.L.R. 1372, affords explicit and sufficient authority for the statement that the "bonds" in question constituted a lien upon the lands in the district. This is especially true when it is remembered that the government had actual notice of appellee's claim and of its unpaid bonds at the times the government was purchasing these lands, and **before all the money was paid over** to the individual owners of the fee. This case was cited in both briefs filed with this court, and is also referred to in the court's opinion, but it does not seem that full significance has been given to at least a part of the quotation from the opinion in that case. In discussing the relative priority of the lien of improvement district bonds identical with those now under consideration, the Idaho Supreme Court stated (see section 10 of the opinion in the Bosworth case):

"The respondents Pacific States Savings & Loan Company, Equitable Loan Company, and Portland Mortgage Company, urge that because the assessment-roll was not filed by the county recorder, notice of the same did not become a lien and they were not charged with notice that there were assessment liens on the land on which they took mortgages. Hence the lien of the bonds is inferior to their mortgages, or at least they are entitled to have the units of assessment segregated for their benefit.

The statute does not require these assessment-rolls to be filed. All parties are charged with knowledge of the law to the effect that C. S., title 32, chap. 163, art. 6, has been complied with; **the lien of the bonds upon the lands of an improvement district becomes fixed and paramount** to any other lien excepting those of the general state, county and city taxes. (C. S., sec. 4013; Jenkins v Newman, 122 Ind. 99, 23 N. E. 683; Page & Jones, Taxation by Assessment, sec. 1068.)" (Heavy type supplied).

Article 6 referred to in the foregoing quotation is the local improvement district law so often referred to in the immediate case. The foregoing quotation seems to be directly in opposition to this court's conclusion that the **bonds** were not a lien upon the lands in the district. The Idaho court, in interpreting this law, explicitly holds that the "bonds" are a lien upon the lands in the improvement district, and that such lien is fixed and paramount to any other lien except the lien of general taxes.

Following the universal rule, this court has held (Boise Payette Lumber Co. v Halloran-Judge Trust Co., 281 Fed. 818) that where a state statute has been construed by the highest court of the state, such construction is binding upon the federal courts. In consonance with this rule,

it would seem incumbent upon this court to adopt the decision of the highest Idaho court and hold that the "lien of the bonds upon the lands" in the district became fixed and paramount.

A portion of the foregoing quotation from the Bosworth case will be found on page 30 of appellee's brief in this court. However, it may be that appellee's counsel took for granted their position that these bonds constituted a lien upon the property in the district and did not emphasize this citation sufficiently. This thought finds support on page 9 of this court's opinion, where a paragraph of appellee's brief is copied. The portion of appellee's brief so quoted indicates that appellee's position is that the assessments alone created the lien in improvement districts of this nature. We respectfully request the court to consider the statements so quoted in connection with the other statements preceding and following the same, on pages 30 and 31 of appellee's brief. Just preceding the quoted statement will be found the quotation from the Bosworth case explicitly stating that **the "lien of the bonds" upon the lands of the improvement districts is fixed and paramount,** and just following the section quoted by this court will be found the statement that under the statutory provisions in question and court decisions "the bonds in question are liens upon the land in the respective districts." The same thought is incorporated in the conclusion in appellee's brief. See page 69, where these words will be found: "these bonds constituted a first lien, except the lien for general taxes."

We endeavored to carry this thought throughout the entire case. Perhaps in the one instance the writers of appellee's brief inadvertently used the word "assessment" rather than the word "bonds." For these reasons appellee earnestly requests the court to consider appellee's position, as revealed from the entire brief, rather than as is possibly indicated in one paragraph of the brief, dealing only indirectly with the question of whether or not the bonds or the assessment constitutes the lien upon the lands in the district.

When so considered it is felt that the appellee's position and argument are in line with the holding of the Bosworth case to the effect that the bonds of an improvement district, like those under consideration, constitute a lien upon the lands in the district. True, decisions from other states appear to arrive at a somewhat different conclusion than that of the Idaho court in the Bosworth case. This is no doubt attributable to the fact that the statutes upon these questions vary in the different states. At any rate, the highest court of the state of Idaho is conceded the right by the highest tribunals of the land to fix the policies of Idaho and interpret its statutes. Such policies and interpretations, it is respectfully submitted, are binding upon this court.

## IF NO LIEN,—BONDS ARE "PROPERTY"

If it be conceded, for the sake of the argument only, that the foregoing position is untenable, then it is respectfully urged that nevertheless the judgment of the district court should be upheld in this case for the reason that

the bonds themselves constitute property that cannot be taken by the government for a public purpose without compensating the bondholders. The term "property" as used in the Fifth Amendment is used in a general sense and embraces every form of property over which man may have exclusive jurisdiction and every form of property which the law recognizes and protects. 12 C. J. 1212; Spring Valley W. Co. v San Francisco, 165 Fed. 667, 676.

As said in the Idaho case of Knowles v New Sweden Irr. Dist., 16 Idaho 217, 231 (101 Pac. 81):

> "Any destruction, interruption or deprivation of the common, usual and ordinary use of property is by the weight of authority a taking of one's property in violation of the constitutional guaranty (citing cases)."

In the rather recent case of Farbwerke, et al, v Chemical Foundation, 39 Fed. (2d) 366, 371, it was held that:

> "* * * a chose in action is property; and an act which takes property from one person and gives it to another * * * without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution."

This case was affirmed by the United States Supreme Court, 283 U. S. 152. A similar case is that of Fisk v Leith, 299 Pac. (Ore.) 1013.

In the case of State v Greer, 37 A.L.R. 1298, 1304, it was specifically held that municipal bonds constitute property within the meaning of similar constitutional provisions. Under the foregoing authorities it seems certain that the bonds admittedly held and owned by the appellee in this case constitute "property" as that term

is used in the Fifth Amendment. And such is the case whether or not the bonds be considered as constituting a lien upon the lands in the improvement district, or merely choses in action, because the bonds, independent of the lien, are "property" and entitled to the protection of the constitutional guaranty. Regardless of the property classification ascribed to these bonds, the fact remains that they are "property" in a constitutional sense, and therefore cannot be appropriated and confiscated by the government for a public purpose without just compensation being paid to their owners.

We again call the court's attention to the case of United States v Lynah, 188 U. S. 445, because we feel there is a direct and striking similarity between the two cases. In the latter case, in connection with the improvement of navigation in the Savannah River certain dams and obstructions were placed and maintained in the river bed, with the result that the raising of the water above its natural height backed the water against plaintiff's embankment upon the river, interfered with the drainage of his plantation, etc. This was held to be a taking of private property within the meaning of the Fifth Amendment, requiring compensation to be paid by the government, nothwithstanding the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property overflowed. On page 468 of the report the court points out that this overflow was to such an extent as to "cause a

total destruction of its value," and thereby the property was "in contemplation of law, taken and appropriated by the government." In a literal sense the land was not taken and carried away; the land remained where it had been, but it was made into an irreclaimable bog, unfit for any purpose and deprived of all value. After a thorough discussion of the authorities and the subject the court stated:

> "While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; * * ." (p. 470).

The only difference between the Lynah case and the immediate case, having in mind the above concession which was made for the sake of the argument (namely, that if there is no lien, yet the bonds constitute property), is that the property taken and appropriated and destroyed in the Lynah case was farm land, while the property similarly taken, appropriated, and destroyed in the immediate case was in the form of municipal bonds. These bonds are just as thoroughly and completely "bogged" and rendered valueless as the claimant's lands were in the Lynah case. The latter case has been quoted and recognized as authority upon the subject by innumerable decisions, and it is confidently urged that the same constitutes sufficient authority for appellee's position upon this point.

In this case it must be remembered, as this court observed on pages 4 and 16 of its opinion, that neither the individual property owner nor the improvement district itself nor the village is personally liable. "There is no personal obligation." The only method of collecting these bonds has been appropriated and taken by the government, and thereby the government has taken and appropriated the property itself. Bonds which were a few months ago valuable, enforceable property now are a mere shadow and as worthless as if the government's officials had actually burned them to ashes, or the reservoir waters had literally and physically buried and "bogged" them forever. There can be no more complete confiscation and taking than that shown in this case.

The court intimates that there is a distinction between the modification of the remedy by government action and destruction of the right. That may be true in cases where the remedy is not unreasonably modified, that is, not so modified as to constitute in reality destruction or taking of the right. As stated in the case of People v La Fetra, 16 A.L.R. 152, 158:

> " * * * any law which in its operation amounts to a denial or obstruction of rights accruing by contract, though professing to act only on the remedy, is directly obnoxious to the prohibitions of the Constitution."

In the latter case writ of error was dismissed by the U. S. Supreme Court, 257 U. S. 665. The Supreme Court of Idaho thus expresses the rule, in the case of Fidelity State Bk. v North Fork H. Dist., 35 Idaho 797, 209 Pac. 448, 31 A.L.R. 781:

> "While the remedy may be modified at the discretion of the legislative body, it cannot be taken away, for the right to property necessarily implies a right to process of law to protect it. The remedy to enforce a contract is a part of the contract, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void. (Edwards v Kearzey, 96 U. S. 595, 24 L. ed. 793.)" (p. 811 Idaho report)

The U. S. Supreme Court made substantially the same holding in the case of Barnitz v Beverly, 163 U. S. 118.

Some of the decisions, notably that of Omnia Comm. Co. v United States, 261 U. S. 502, make an apparently narrow and fine distinction between the terms "taking," "destruction," and "injury." However, when the latter case is studied, it will be observed that there was no confiscation or taking of the "obligation or the right to enforce it." As pointed out in the case of International Paper Co. v United States, 282 U. S. 399, 408, the action of the United States made it "practically impossible" for the company to keep its contract. However, in the Omnia case there was no taking or acquisition of the right to enforce the contract, as pointed out by the Supreme Court in its own opinion. In the immediate case there has been an absolute and permanent taking of the right to enforce the obligation of the bonds, and thereby the bonds have been for all legal and equitable purposes taken and appropriated forever. The destruction and taking in the immediate case is far more thorough and permanent than the taking of the claimant's land in the Lynah case. The bonds now remain in the possession

of the appellee, but the action of the government has taken away every penny of value that was attached to the bonds before the action of the government.

Most of the foregoing cases deal with the constitutional provision prohibiting the impairment of the obligation of contracts, while the immediate controversy involves the Fifth Amendment. The situations are analogous and the same reasoning should apply.

## STATUTES OF LIMITATIONS

In the latter part of the court's opinion it is stated that the suit is too late. We respectfully submit that the court has not correctly analyzed appellee's position upon this phase of the case. The appellant has consistently argued, in line with this court's holding, that any action which the appellee might have had accrued when the government acquired the property from the individual owners. In other words, that the date of the contracts of purchase, or deeds, from the individual owners to the government started the statutes of limitations running. Appellee's answer to this position is twofold.

In the first place, as pointed out on pages 15 to 17 of appellee's brief in this court, the statute of limitations is an affirmative defense. Not only must the one relying thereon affirmatively plead it, but the burden also rests upon him to affirmatively establish it by competent evidence. The record shows that the government has pleaded the statutes of limitations in this respect, but certainly no proof has been submitted showing the date of these contracts and deeds, with only two exceptions.

Mr. Banks, the government engineer, testified that he took possession of the first piece of land,

> "in 1920 or early in the spring of 1921 and the balance of the lots required for reservoir site were required by the defendant the United States by purchase and condemnation between that time and the year 1926 * * *." (R. 131)

See also defendant's exhibit 1, which is the land purchase contract between Dahlen and the government for a specific lot. This contract was dated December 9, 1925. To summarize, the record shows that one lot was acquired in 1920 or 1921 and another was acquired December 9, 1925. Positively and emphatically there is no showing as to the date when any other lot, of the many buried beneath the reservoir and formerly part of the American Falls townsite, was acquired by the government. In view of the record and under the authorities cited on pages 16 and 17 of appellee's brief in this court, the government has not produced evidence upon which the plea of the statute of limitations can be upheld, even under the theory that the statute began to run when the property was acquired by the government from the individual owners.

In the second place, appellee answers this proposition as to the statute of limitations by reiterating its theory and agrument that the statute of limitations did not begin to run when the contracts and deeds were executed, for the reason that these contracts and deeds did not amount to the acquisition by the government of the full fee and title of the property. Explicitly and clearly the con-

tracts under which the government acquired the land recognized that there were or may be liens or encumbrances against the property and provided that the government might withhold sufficient sums to pay such liens or encumbrances as might exist. See paragraph 7 of defendant's exhibit 1. This is tantamount to the government's acquiring the property subject to the lien of appellee's bonds. Patently the government did not thereby take appellee's bonds or its lien or its property, it merely acquired the individual owners' property rights in the land, leaving the lien or right of appellee and of other lien holders or encumbrancers intact and to be paid in regular course. It is appellee's position that the statute of limitations did not begin to run until the government repudiated its implied promise to take care of and pay the liens and encumbrances against the land, including appellee's bonds. We use the expression "the government's implied promise to pay appellee" advisedly, because the record abundantly shows, and admittedly shows, that the government officials in charge of the construction of the reservoir had complete and thorough notice of the outstanding bonds owned by appellee; more than this, for a time these officials withheld money from the individual owners to take care of these bonds, until some $13,000 or $14,000 were in a fund for such purpose, and then sometime in 1929, for what reason the record does not show, the government officials determined that they would not pay appellee's bonds, and thereby repudiated their promise so to do. The appellee's right of

action could not arise so long as its property remained unappropriated. Appellee's property, whether its property be considered as bonds secured by lien upon the property within the districts, or merely as unsecured bonds, or choses in action, was not appropriated as long as the government was acquiring the land, subject to "liens or encumbrances existing against said property" (Deft's Ex. 1, par. 7), and promising and arranging to pay appellee. When the land was flooded by the waters of the reservoir, appellee's property was taken, confiscated, and destroyed permanently and absolutely. Then appellee's right of action arose. The suits were not filed at that time because the government officials were promising to pay appellee and were withholding funds for that purpose. However, in 1929, this arrangement was repudiated by the government officials and thereupon the immediate action was filed. This action was within the period of the statute of limitations as fixed by the Tucker Act, since it was within six years of the date of the "taking" of appellee's property for a public purpose.

For the foregoing reasons it is earnestly and respectfully urged that this court grant a rehearing in this case, and upon such rehearing affirm the judgment appealed from.

BISSELL & BIRD
Attorneys for Appellee.